No. 11,035

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JIM JUNG and MARTY SHERMAN,

Appellants,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,

Appellee.

BRIEF FOR APPELLEE.

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JURISDICTION.

This is an appeal by the defendants from a judgment entered on December 14, 1944 (R. 10), by the United States District Court for the Southern District of California, Central Division, in favor of the Price Administrator pursuant to Section 205(e) of the Emergency Price Control Act of 1942—56 Stat. 23, 50 U. S. Code App. Section 925(e)—hereinafter referred to as the Act, as amended by Section 108(b) of the Stabilization Extension Act of 1944 (58 Stat. 840). Notice of Appeal was filed March 9, 1945 (R. 10). Jurisdiction of the District Court was invoked under Sections 205(c) and 205(e) of the Act. Jurisdiction

to hear and determine the appeal is conferred upon this Court by Section 128 of the Judicial Code (28 U. S. Code 225).

STATUTES AND REGULATIONS INVOLVED.

The action involves two regulations issued by the Administrator pursuant to Section 2(a) of the Act, namely, the General Maximum Price Regulation, issued April 28, 1942 (7 F. R. 3153), which became effective on May 11, 1942, and Maximum Price Regulation 271, issued November 7, 1942, establishing maximum prices for potatoes and onions (7 F. R. 9179) which became effective on November 9, 1942.

STATEMENT OF FACTS.

This is an action by the Price Administrator against "Jim Jung, Marty Sherman and Marvin Berry, individually and doing business as Victory Produce Company" (R. 2), to recover statutory damages by reason of overcharges made by the defendants on sales of potatoes at wholesale between April 12, 1943, and May 27, 1943. Throughout the period of the transactions in question the defendants Jim Jung, Marty Sherman, and Marvin Berry were co-partners, doing business as Victory Produce Company, with the principal place of business located in Los Angeles, California (Amended Compl., par. 4, R. 3; admitted in the Answer, R. 5). All three defendants appeared by Mr. Lerner, their attorney, and filed answer to the complaint (R. 5),

although only Jim Jung and Marty Sherman were served with process. Mr. Lerner later withdrew his appearance for the defendant Marvin Berry and plaintiff stipulated that Mr. Lerner was not representing Berry as an individual (R. 20, 21).

The potatoes which the Victory Produce Company sold at prices in excess of the maximum price permitted under Maximum Price Regulation 271 were purchased by said partnership from Marvin Berry, one of the partners (R. 17, 20, 40, 43-44; App. Br., p. 25), and were delivered to the partnership at its place of business in Los Angeles from Berry's warehouse in Bakersfield (R. 20). Berry charged his partners a freight rate of 30 cents per hundredweight for delivering the potatoes by contract carrier (R. 20). This freight was paid by the defendants directly to the trucking company "as a matter of bookkeeping convenience" (Mr. Lerner's statement, R. 43-44). Under the General Maximum Price Regulation the legal rate for the haul in question, i.e., the base rate prevailing in March, 1942, was 18 cents per hundredweight (R. 24). In computing their own costs for purposes of mark-up, the defendants added to their net cost the illegal freight rate of 30 cents per hundredweight (12 cents above the legal rate permitted under the General Maximum Price Regulation) and passed the same on to the consumer. They contend on this appeal that they were entitled to do so.

The Court found that the defendants violated Maximum Price Regulation 271 by charging prices totaling $8965.78 in excess of the legal prices permitted under

said Regulation (R. 8) and that the overcharges were made in good faith and all practicable precautions were taken against making such overcharges (R. 6, 8). Judgment was entered in favor of the plaintiff and against the two defendants served, Jim Jung and Marty Sherman, in the sum of $5977.18. No judgment was granted against the partner not served.

ARGUMENT.

I. THE PROCEDURAL CONTENTIONS OF THE APPELLANTS ARE UTTERLY WITHOUT MERIT.

The principal contention of the appellant is purely procedural. Insofar as it can be understood at all, its amazing "logic" runs as follows: In California a partnership is a legal entity; the California Code of Civil Procedure, Section 388, permits partnerships to be sued "in their common name" in the same manner as corporations by alleging the legal entity and naming it as the defendant; plaintiff did not name the partnership as a separate defendant and it is therefore not a party to the action; none of the partners (defendants below) personally sold the potatoes in question, but that all such sales were made by employees of the partnership; *therefore* only the partnership as such is liable for the overcharges, and *not* the individual partners!

A. The substantive law of partnerships in California is not affected by Section 388 of the California Code of Civil Procedure.

Appellants' entire argument is based upon a gross misconstruction of Section 388 of the California Code of Civil Procedure. Appellants assume that the said section effects a change in the substantive law governing partnerships by declaring California partnerships to be legal entities. This section, however, authorizing actions to be brought against partnerships "in their common name", merely provides a convenient method of suing partnerships and associations by naming them as defendants and dispensing with the necessity of naming or serving individual partners. The California Supreme Court, in passing upon the constitutionality of Section 388, stated:

> "These statutes (similar to Section 388) dealt solely with the manner of bringing actions, and were not intended to effect any change in the substantive law. Members of associations had the same rights and were subject to the same liabilities as before, only now they could be sued by a less complicated and cumbersome process * * * Since it (Section 388) establishes no substantive liability, and merely provides a convenient method of suit to enforce an existing liability * * *"
>
> *Jardine v. Superior Court,* 213 Cal. 301, 2 P. (2d) 756 (1931).

In *Reed v. Industrial Commission,* 10 Cal. (2d) 191, 73 P. (2d) 1212, 1213 (1937), the Court, in discussing the legal entity theory, stated:

> "The underlying fallacy in respondent's argument is the assumption that the partnership is a

distinct unit, separate from the members thereof. Occasional suggestions of this 'entity' theory of partnership are found in statutes or decisions, but, apart from exceptional situations, a partnership is not considered an entity, but an association of individuals. See *First Nat. Trust & Savings Bank v. Industrial Accident Commission,* 213 Cal. 322, 331, 2 P. 2d 347, 78 A.L.R. 1324; 9 Cal. L. Rev. 119. In consonance with this view, an employee of a partnership is an employee of each of the partners, and no individual partner may escape liability to such employee on the ground that only the partnership and not the individuals composing it can be held. It is immaterial whether the liability of the partners in this situation is joint and several, or joint, for even in the case of joint liability, a several judgment may be had against an individual partner by proper joinder, and pleading. See *Palle v. Industrial Commission,* 79 Utah 47, 7 P. 2d 284, 81 A.L.R. 1222; *Merchants' Nat. Bank v. Clark-Palmer Co.,* 215 Cal. 296, 9 P. 2d 826, 81 A.L.R. 778."

Therefore, appellants' assumption that the individual partners, as such, are not liable for the partnership obligations is not sustained by the "legal entity" theory.

B. In an action upon a joint or partnership obligation in which the partnership as such is not named nor all of the partners served with summons, the action may nevertheless proceed against those who are served.

As has been shown above, Section 388 does not purport, nor has it ever been construed, to abolish the

right to sue partners without designating the common name as a separate defendant.

Jardine v. Superior Court, supra.

When the common name is not used and all the partners are not served, the action may proceed and judgment may be had against those partners served.

Davidson v. Knox, 67 Cal. 143, 7 Pac. 413;
Feder v. Epstein, 69 Cal. 456, 10 Pac. 785;
Iwanaga et al. v. Hogopian et al., 179 Pac. 523, 39 Cal. App. 584.

This procedure is specifically authorized in California by Sections 414, 578 and 989 of the Code of Civil Procedure, which apply to actions on all joint or partnership obligations.

Merchants' Nat. Bank of Los Angeles v. Clark-Parker Co., 215 Cal. 296, 9 P. (2d) 826;
Reed v. Industrial Accident Commission, supra.

The appellants cite a number of California decisions holding that a partnership does not become a party to an action merely because its members are designated as co-partners. Conceding, *arguendo,* that this is not an action against the partnership within the meaning of these decisions and that *the partnership property will not be bound by the judgment against the individual partners because all were not served,* it is impossible to see the materiality of these decisions to the instant case. In none of these decisions was it held that partners *must* be sued in their common name or that, when all partners are named but only some served, the suit may not proceed to judgment against

those served. On the contrary, *in each case cited the judgment against the partners served was upheld.*

C. In any event, the California rule of pleading invoked by the appellants is superseded by the Federal Rules of Civil Procedure. Appellants' claim was waived by their failure to plead or move with respect thereto.

As demonstrated under Point I, the legal entity theory in California is not one of substantive law. On the contrary, even under the California law it has clearly been held to be only a rule of pleading.[1]

However, as to all matters of pleading, the Federal Rules of Civil Procedure "govern" this action (Rule 1), and "all laws in conflict therewith shall be of no further force or effect" (28 U. S. Code 723(b)). It is elementary that, under the Federal Rules of Civil Procedure, an action cannot be defeated because of technical defects in the pleading.

Sparks v. England, 113 F. (2d) 579, 581 (8th Cir., 1940);

Hanney v. Franklin Fire Insurance Co. of Philadelphia, 142 F. (2d) 864 (9th Cir., 1944).

With regard to the specific defect complained of by the appellants, Rule 9(a) of the Federal Rules of Civil Procedure provides that "it is not necessary to

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[1]*Jardine v. Superior Court, supra; Reed v. Industrial Commission, supra; Burns v. Downs,* 42 Cal. App. (2d) 322, 108 P. (2d) 953. The California courts do not recognize the legal entity theory where the suit is *brought* by the partnership as *plaintiff,* and in such a case the action must be brought in the names of the individual partners. *Ginsburg Tile v. Faraone,* 99 Cal. App. 381, 278 Pac. 866 (1929); 126 Cal. App. 337, 14 Pac. (2d) 777 (1932).

aver * * * the legal existence of an organized association of persons that is made a party". Hence the California doctrine, insofar as it purports to require allegations of the legal existence of the partnership in the complaint, is plainly "of no force and effect" in actions in the Federal Courts.

Furthermore, under Rule 12(b) the defense of lack of jurisdiction over the person must be made by answer or by motion before pleading, and under Rule 12(h) the defense is waived if not so presented. In the instant case the claim of lack of jurisdiction over the partnership was for the first time urged at the trial, as a ground for dismissal of the action. Hence

> "* * * *the point, whether considered as a question of capacity under Rule 9(a) or of lack of jurisdiction over the person under Rule 12(b), was waived under Rule 12(h) by not being advanced before trial.*"
>
> *Trounstine v. Bauer, Pogue & Co.*, 144 F. (2d) 379, 383 (2d Cir., 1944), certiorari denied, 65 S. Ct. 190.

II. THE CAUSE OF ACTION WAS ESTABLISHED BY COMPETENT AND UNCONTROVERTED EVIDENCE. THE APPELLANTS' CONTENTIONS ON THE MERITS ARE NOT BASED ON THE RECORD, AND FOR THE MOST PART WERE NEVER URGED BELOW.

A. The uncontroverted evidence established that the defendants paid on behalf of their seller, who was their own partner, illegally excessive freight charges, and passed them on to their customers.

The record presents no controverted questions of fact. The defendants purchased potatoes from their

partner Berry, to be delivered from his warehouse in Bakersfield to their place of business in Los Angeles. "Almost all of the potato shipments" were made "by contract carrier, by truck" (App. Br., pp. 22-23). Berry was charged a freight rate of 30 cents per hundredweight (stipulation at the trial, R. 20). This charge was actually paid by the defendants direct to the trucking company, as a separate item. The procedure was described in the Court below by the defendants' attorney himself (R. 43-44):

> "Mr. Lerner. I think maybe we ought to enter into the stipulation this way; I offer this stipulation: I think it is generally recognized that the sales were made on a delivered basis; that the freight was being purportedly paid for by Mr. Berry, but as a matter of bookkeeping convenience, at the request of Mr. Berry we would pay the freight directly to the Edison Trucking Company, and deduct the same from the price billed to us by Marvin Berry or other potato companies from whom we purchased. I say 'we'; I mean from whom the Victory Produce Company purchased."

The seller who charged this freight and who sold all the potatoes in question was Mr. Marvin Berry, one of the partners. Although "other potato companies from whom we purchased" are mentioned in the quoted statement, the appellants have since conceded on this appeal that Marvin Berry was the only person who acted as the seller (App. Br., at p. 25). There is other evidence in the transcript pointing to the same fact (R. 17, 20, 40).

The authorized legal rate for this freight was that charged for the same service in March, 1942 (General Maximum Price Regulation, Sec. 1499.2). It was established by competent testimony and stipulated by the appellants that this was 18 cents per hundredweight (R. 24).

The bulk of the potatoes were sold by the defendants at prices which included and passed on to their customers the excessive transportation charge, plus a mark-up (of 21% or 9½%, depending on whether the goods were delivered at the customers' or defendants' place of business). A complete summary of the defendants' sales on credit[2] showing computation of ceiling, overcharge and selling price for each hundredweight, was prepared by the plaintiff's investigators who had audited the defendants' records. This summary was received in evidence as Plaintiff's Exhibits 1 and 2, and its factual and mathematical correctness was stipulated by defendants' counsel (R. 53-54, 60-61, 66-67).[3]

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[2]The proof was limited to sales made on credit. As to all cash sales, the defendants, according to their attorney, "were unable to locate the record of cash sales" (R. 41).

[3]The defendants made many overcharges in excess of the freight differential, and indeed charged prices without any reference to the regulations. The stipulated itemized record (Plaintiff's Exh. 2, pp. 20-48) shows a multitude of overcharges substantially in excess of 12 cents plus mark-up. No attempt to justify these overcharges was made below or in the appellants' opening brief.

B. Nothing appears in the record to support the appellants' contention that in computing their selling prices they relied on their seller's invoices; nor was this contention ever urged below.

The principal contention of the appellants on the merits is that the regulations permitted them to rely on their seller's invoices in computing their costs for the purposes of fixing their own selling prices (App. Br., pp. 3, 15-25, 26, 30, 32, 33). The essence of the argument is that "the Victory Produce Company had the right to base the computation of its selling price upon the price which it paid to the country shipper as set forth in his invoice, without bearing the responsibility of determining whether the country shipper had correctly ascertained and included the proper freight charge in the price at which he was selling" (App. Br., pp. 16-17).

This contention is cynical in its disregard of the facts and the record. Not a single invoice was offered in evidence, nor a word of testimony introduced to show any reliance thereon. *The seller was the defendants' partner, and the freight was paid by the defendants as a separate item, directly to the carrier* (R. 43-44; pp. 9, 10, *supra*). Moreover, since the appellants themselves paid the freight direct to the shipper, it cannot be determined from the record whether the invoice given the partnership by Berry even included the freight rate charged.

It is significant that the appellants did not have the temerity to urge this claim upon the trial Court. It is made for the first time on this appeal.

It will be noted that appellants' contention is not predicated on any facts and is entirely moot. Therefore, its legal validity (which appellee emphatically rejects) is not a proper subject for argument.

C. The remaining contentions of the appellants are without substance.

1. It is hardly necessary to argue the further contention that defendants had the right to pay and pass on to their customers illegal freight charges because sales of potatoes were governed by the specific Maximum Price Regulation 271 and not by the General Maximum Price Regulation which established maximum prices for freight charges. It should be noted that like the claim that the defendants were misled by their seller's invoices, this contention with regard to the inapplicability of the General Maximum Price Regulation was not made below.

In any event, the prohibition against paying illegal prices for commodities and services is contained not only in the Maximum Price Regulation but in the Act itself (Sec. 4a). The "cost" of a commodity to a seller cannot possibly mean the cost augmented by illegal freight charges. The authorization to pay seller's "actual freight" (M.P.R. 271 as quoted in App. Br., p. 19) cannot conceivably have reference to black-market freight. To carry the appellants' argument to its logical conclusion, any purchasers in the black market would be permitted to pass on their illegal costs to the public.

If a specific prohibition against such a practice is required, it is supplied by Maximum Price Regulation 271, governing the sales of potatoes, which at all times contained the following Section:

> "§ 1351.1008. Evasion. The price limitations which are set forth in this Maximum Price Regulation 271 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation, agreement, sale, delivery, purchase or receipt of or relating to any of the commodities listed in any Appendix hereof, alone or in conjunction with any other commodity or by way of commission, service, *transportation* or any other charge or account, discount, premium, or other privilege, or by tying-agreement or other trade understanding or otherwise." (Emphasis added.)

2. The arguments that the plaintiff was obliged to prove the availability of transportation by common carrier (App. Br., pp. 26-27) and that the Court erred in admitting evidence as to the common carrier rates (id., p. 30), are simply irrelevant. The gravamen of the action is not that the defendants failed to use common carriers, but that they passed on to their customers illegal freight charges of contract carriers. Practically all of the shipments were made by contract and not by common carrier (id., pp. 22-23; R. 30).

3. On this appeal the attempt is made to influence the Court by reference to matter dehors the record, relating to subsequent litigation between the Price Administrator and the missing partner, Marvin Berry (App. Br., pp. 25, 33). It is submitted that this matter

has no place in the brief, and that appellee cannot rebut it without becoming guilty of the same improper practice.

III. SINCE THIS APPEAL RAISES NO SUBSTANTIAL QUESTION FOR CONSIDERATION BY THE COURT AND IS WHOLLY LACKING IN MERIT, IT SHOULD BE DISMISSED AS FRIVOLOUS AND DAMAGES SHOULD BE AWARDED TO THE APPELLEE PURSUANT TO SECTION 878, TITLE 28, U. S. CODE AND RULE 26 OF THIS COURT.

A. The procedural contentions of the appellants are without any support of authority and are obviously frivolous.

Examination of the record and the appellants' opening brief discloses that the procedural contentions of the appellants formed the principal defense below and one of the major grounds of appeal. It has been shown above that these contentions are not based on the decisions cited by the appellants or on any other authority. The sole point established by these decisions is that where not all the partners are served, the partnership property will not be bound unless the partnership name or entity was added as a party. Obviously this principle, whatever its validity, has no relation to the judgment appealed from, which is against two individual partners. As has been shown under point I, *supra,* California statutory and common law specifically authorizes actions against partners without the use of the partnership name; and where, as in this case, all partners are named but not all are served, individual judgments may be obtained against the partners on the partnership liability. This was held

in the two leading California cases, *Davidson v. Knox* and *Feder v. Epstein,* which are cited by the appellants themselves (App. Br., p. 13).

Incredible as it may seem, in every case cited by appellants in support of their procedural contention, the Court sustained the precise procedure followed in the case at bar, and approved judgments against those partners who were served, though the partnership in each case was not named as a defendant.

B. The appellants' contentions on the merits are equally frivolous.

The chief contention of the appellants on the merits is that in computing their maximum selling price they had the right to rely on invoices from their seller which included an item of freight in the price to the appellants. We have seen under point II that this contention is belied by the record. There is not one iota of evidence to show any *actual* reliance on any invoice. The record does show, however, that the defendant "seller" was *their own partner* and that the freight was paid *by them* as a separate item *direct* to the trucking company. Furthermore, the contention was never urged below and therefore cannot be urged as a ground of reversal. It thus appears that the appellants' contentions on the merits are at least as frivolous as their procedural argument.

CONCLUSION.

It clearly appears that this appeal raises no substantial question for consideration by the Court and is wholly lacking in merit. The conclusion is irresistible that the appeal has been sued out merely for delay. Under such circumstances an appeal may be dismissed as frivolous and damages awarded pursuant to statute (28 U. S. Code 878):

Robertson v. Wilkinson, 10 F. (2d) 311 (C.C.A. 5th, 1926);

Dakin v. U. S., 105 F. (2d) 150 (C.C.A. 4th, 1939).

It is respectfully submitted that the judgment of the lower Court should be affirmed, or that the appeal herein should be dismissed as frivolous and damages for delay awarded to the appellee pursuant to Rule 26 of this Court.

Dated, September 21, 1945.

Respectfully submitted,

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(Appendix Follows.)

Appendix.

Appendix

APPLICABLE PROVISIONS OF THE EMERGENCY PRICE CONTROL ACT OF 1942 AS AMENDED BY SECTION 108(b) OF THE STABILIZATION EXTENSION ACT OF 1944.

Sec. 2. (a) Whenever in the judgment of the Price Administrator (provided for in Section 201) the price or prices of a commodity or commondities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. * * *

Sec. 4. (a) It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwise to do or omit to do any act, in violation of any regulation or order under Section 2, or of any price schedule effective in accordance with the provisions of Section 206, or of any regulation, order, or requirement under Section 202(b) or Section 205(f), or to offer, solicit, attempt, or agree to do any of the foregoing.

Sec. 205. (e) If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption

other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided, however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be; and the word "overcharge" shall mean the amount by which the consideration exceeds the applicable maximum price. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year

period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

APPLICABLE PROVISIONS OF THE GENERAL MAXIMUM PRICE REGULATION. (ISSUED APRIL 28, 1942; 7 F. R. 3153, EFFECTIVE MAY 11, 1942.)

Maximum Prices.

§ 1. (§ 1499.1) Prohibition against dealing in commodities or services above maximum prices. On and after the effective date of this Regulation, regardless of any contract or other obligation:

(a) No *person* shall *sell* or deliver any *commodity,* and no person shall sell or supply any *service,* at a price higher than the maximum price permitted by this Regulation; and

(b) No person in the course of trade or business shall buy or receive any commodity or service at a price higher than the maximum price permitted by this Regulation.

* * * * * * *

§ 2. (§ 1492.2) Maximum prices for commodities and services: general provisions. Except as otherwise provided in this Regulation, the *seller's* maximum price for any commodity or service shall be:

(a) The highest price charged by the seller during March, 1942:

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it; or

(b) If the seller's maximum price cannot be determined under paragraph (a), the highest price charged during March, 1942, by the most closely competitive seller of the same class:

(1) For the same commodity or service; or

(2) If no charge was made for the same commodity or service, for the similar commodity or service most nearly like it.

APPLICABLE PROVISIONS OF MAXIMUM PRICE REGULATION 271.

§ 1351.1001. Applicability of this Maximum Price Regulation No. 271. (a) Commodities to be priced under this regulation. This regulation applies to the following perishable food commodities:

(1) All white flesh potatoes, whether used for human consumption or as seed potatoes.

(2) All dry onions used for human consumption, produced in the calendar year 1942.

(b) To what types of sellers this regulation applies. This regulation applies to country shippers and all intermediate sellers, as defined herein, of the commodities listed in paragraph (a) of this section, but does not apply to retailers.

(c) Purposes of this regulation. (1) Appendix A sets forth maximum prices and repeats the applicable differentials set forth in § 1351.1002(b) for the country shipper, at the country shipping point, on board car or any other common carrier, for each variety and grade, in the month of sale and area in which the commodities were produced.

(2) Appendix B sets forth the figures which different classes of intermediate sellers must use in calculating maximum prices.

(d) Prohibition against sales above maximum prices. On and after November 9, 1942, regardless of any contract or other obligation, no person is permitted to sell or deliver perishable food commodities at prices higher than the maximum prices established by this regulation, and no person is permitted to buy or receive perishable food commodities in the course of trade or business at prices higher than the maximum prices herein established. Lower prices may be charged and paid.

§ 1351.1003. How an intermediate seller calculates his maximum prices for perishable food commodities listed in Appendix B. * * *

(b) The intermediate seller shall calculate once every week on the day set forth opposite the name of

the food commodity in Appendix B his maximum price for each variety and grade of such food commodity as follows:

(1) The intermediate seller shall first find from paragraph (a) of this section in what class of intermediate seller he falls.

* * * * * * *

(4) The intermediate seller shall then determine his "net cost" of his "largest single purchase" as defined above, of the food commodity being priced. "Net cost" means the amount he paid for the food commodity delivered at his customary receiving point less all discounts allowed him except the discount for prompt payment; however, no charge or cost for local unloading or local trucking shall be included.

(5) The intermediate seller shall then multiply his "net cost" as defined above, by the figure in Appendix B which applies to the class in which the intermediate seller falls. The resulting figure is the maximum price which the intermediate seller is permitted to charge for the 7-day period from the day set forth opposite the name of the food commodity set forth in Appendix B, provided that if an intermediate seller purchases food commodities from another intermediate seller, he shall resell such food commodities directly to a retailer, and shall not resell to another intermediate seller.

§ 1351.1008. Evasion. The price limitations which are set forth in this Maximum Price Regulation No. 271 shall not be evaded whether by direct or indirect methods, in connection with any offer, solicitation,

agreement, sale, delivery, purchase or receipt of or relating to any of the commodities listed in any Appendix hereof, alone or in conjunction with any other commodity or by way of commission, service, transportation or any other charge or account, discount, premium, or other privilege, or by tying-agreement or other trade understanding or otherwise.

APPLICABLE PROVISIONS OF THE CALIFORNIA CODE OF CIVIL PROCEDURE.

§ 388. (Associates may be sued by name of association.) When two or more persons, associated in any business, transact such business under a common name, whether it comprises the names of such persons or not, the associates may be sued by such common name, the summons in such cases being served on one or more of the associates; and the judgment in the action shall bind the joint property of all the associates, and the individual property of the party or parties served with process, in the same manner as if all had been named defendants and had been sued upon their joint liability. (Enacted 1872; Am. Stats. 1901, p. 127 (unconstitutional); Stats. 1907, p. 704.)

§ 414. Proceedings where there are several defendants and part only are served. When the action is against two or more defendants jointly or severally liable on a contract, and the summons is served on one or more, but not on all of them, the plaintiff may proceed against the defendants served in the same manner as if they were the only defendants. (Enacted 1872.)

§ 578. Judgment may be for or against one of the parties. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants; and it may, when the justice of the case requires it, determine the ultimate rights of the parties on each side, as between themselves. (Enacted 1872.)

§ 989. (Summoning unserved joint debtor to show cause why he should not be bound by judgment.) When a judgment is recovered against one or more of several persons, jointly indebted upon an obligation, by proceeding as provided in Section 414 of this code, those who were not originally served with the summons, and did not appear in the action, may be summoned to appear before the court in which such judgment is entered to show cause why they should not be bound by the judgment, in the same manner as though they had been originally served with the summons. (Enacted 1872; Am. Stats. 1933, p. 1896; Stats. 1935, p. 1965.)